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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Defendant The Brinkmann Corporation
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Date	01/05/2009
Attachments	Brinkmann Reply Brief re Dilution MSJ.PDF ( 21 pages )(767730 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRINK’S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**APPLICANT BRINKMANN’S REPLY BRIEF IN SUPPORT OF ITS  
MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS  
OPPOSER’S CLAIM OF DILUTION**

**I.  
INTRODUCTION**

Pursuant to 37 C.F.R. § 2.127(e)(1), Applicant The Brinkmann Corporation (“Brinkmann”) respectfully submits this reply brief in support of its motion for partial summary judgment to dismiss the claim of dilution asserted by Opposer Brink’s Network, Incorporated (“Brink’s Network”).

In its opposition to Applicant’s motion for summary judgment, Opposer has taken great pains to present purported “evidence” in support of the alleged fame of the BRINKS mark. Opposer also protests vigorously that it never had the opportunity to challenge Applicant’s prior Registration No. 1,153,730 for BRINKMANN because dilution was not a recognized basis for opposition or cancellation back in 1981. But even when dilution did become a ground for

opposition or cancellation, Opposer still failed to challenge Applicant's Registration No. 2,779,986 for BRINKMANN BACKYARD KITCHEN. Opposer does not deny that it failed to file an opposition or cancellation proceeding against this second registration, but now asserts that its "delay" in doing so was somehow "tolled" by Opposer's filing of this opposition. Opposer is incorrect, as punctuated by the fact that Applicant's Registration No. 2,779,986 was recently declared incontestable by the PTO.

More importantly, however, Opposer's arguments are trumped by the undisputed facts that (1) Brinkmann now owns two incontestable registrations for the mark BRINKMANN, and (2) Brinkmann will own a third BRINKMANN registration after conclusion of this proceeding, given that Opposer chose to oppose only certain goods in one class of Applicant's multi-class application. Nothing in this proceeding will change those facts. How, then, can a dilution claim be based on the few goods in the one class of Applicant's pending application that Opposer has opposed? Any dilution, if it exists, is a *fait accompli*, having occurred nearly 30 years ago. Necessarily, registrations of a mark that are incontestable or unchallenged preclude a claim of dilution against an application for another registration of the same mark.

Applicant Brinkmann's two incontestable registrations for the mark BRINKMANN, and Opposer's failure to challenge either those registrations or the pending application except for a few goods in one class, are undisputed and incontrovertible. For these reasons alone, Applicant is entitled to judgment as a matter of law on the issue of dilution.

## **II.**

### **ADDITIONAL RELEVANT FACTS**

The five-year anniversary date of registration for Brinkmann's Registration No. 2,779,986 for BRINKMANN BACKYARD KITCHEN was November 4, 2008. Brinkmann filed a declaration of incontestability under Section 15 of the Trademark Act, 15 U.S.C. § 1065,

on November 7, 2008. (*See* Declaration of Susan Hwang, “Hwang Decl.,” ¶ 3 and Exh. 1.) The PTO issued a “Notice Of Acceptance And Acknowledgment Of §§ 8 & 15 Declaration” for Brinkmann’s registration on December 2, 2008. *See* Hwang Decl., ¶ 4 and Exh. 2.

### **III.** **ARGUMENT**

**A.     Opposer’s Alleged Dilution Claim Fails As a Matter of Law Because Any Alleged “Dilution” Occurred Almost 30 Years Ago, As Evidenced By Applicant’s Two Incontestable Prior Registrations for BRINKMANN**

Summary judgment is an appropriate method for disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. FED. R. CIV. P. 56(c). Opposer Brink’s Network insists that there are genuine issues of material fact with respect to its dilution claim that render summary judgment inappropriate. Specifically, Brink’s Network has produced declarations, a survey and printed publications in an attempt to demonstrate that its BRINKS mark is famous and that it gained purported fame prior to Applicant’s use of the BRINKMANN mark. Opposer Brink’s Network has urged the Board to reject any attacks by Applicant on Opposer’s evidence because Opposer will not have an opportunity to respond to such new evidence.

Applicant Brinkmann, however, does not need to attack Opposer’s evidence, because Opposer’s evidence, even if true, would be immaterial.<sup>1</sup> The only material facts necessary for the Board to rule on this motion for summary judgment are undisputed, as follows: (1) Applicant owns a pre-existing, incontestable registration for the mark BRINKMANN (U.S. Reg. No. 1,153,730); (2) Applicant owns a now incontestable registration for the mark

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<sup>1</sup> Applicant respectfully reserves the right to challenge Opposer’s evidence in support of its dilution claim in further proceedings if for any reason Applicant Brinkmann’s motion for partial summary judgment to dismiss Opposer’s dilution claim is denied.

BRINKMANN BACKYARD KITCHEN (U.S. Reg. No. 2,779,986); and (3) Opposer has limited its opposition to a few goods in one class of Applicant's multi-class application.

None of the survey results, none of the magazine articles, and none of the other evidence that Opposer Brink's Network has presented can change these facts. How then, can there logically be any dilution caused by Applicant's additional registration of the same mark? Applicant Brinkmann firmly believes that its BRINKMANN mark does not dilute Opposer's BRINKS mark, but even if it did, any alleged dilution already occurred nearly 30 years ago.

As the old saying go, "It's no good shutting the barn door after the horse has bolted." With its dilution claim, Opposer Brink's Network is attempting to shut the barn door on Applicant's BRINKMANN mark to no avail and, frankly, thirty years too late. The change in the law on dilution in 1999 did not nullify pre-existing, incontestable registrations and restart the clock for asserting dilution claims. There is simply no basis in dilution to deny Applicant another registration for BRINKMANN when it already owns two incontestable registrations and Opposer is not opposing a third, multi-class registration, except as to a few goods in one class.

**B. Applicant's Affirmative Defense of Laches Defeats Opposer's Alleged Claim of Dilution As a Matter of Law**

**1. Opposer Brink's Network's Inability to Contest Applicant's Registration No. 1,153,730 for BRINKMANN is Irrelevant**

Opposer Brink's Network makes many excuses for its failure to oppose or cancel Applicant's Registration No. 1,153,730 for BRINKMANN, the foremost reason being the registration of the mark in 1981, before dilution even became a ground for opposition or cancellation. But the blunt response is, "So what?" Even if no fault attaches to Opposer, it does not change the fact that Registration No. 1,153,730 for BRINKMANN issued, has been declared incontestable, and still exists today. Any alleged dilution by this pre-existing registration has

gone uncontested for nearly 30 years.

**2. Even When Opposer Brink's Network Could Challenge Applicant's Registration No. 2,779,986, Opposer Failed to Do So**

**a. Opposer's Assertion that BRINK'S and BRINKMANN BACKYARD KITCHEN are not Sufficiently Similar is Inconsistent Reasoning**

Opposer argues that Opposer did not contest Registration No. 2,779,986 because “although the marks BRINK'S and BRINKMANN *per se* are sufficiently similar to support a dilution claim, the inclusion of the wording BACKYARD KITCHEN in the composite mark . . . poses a significant obstacle to a successful challenge on § 43(c) dilution grounds”. *See* Opposition at p. 14. Opposer goes on to state that the “words [BACKYARD KITCHEN] have no meaningful commercial connotation in connection with home security systems and components therefor, which also militates against a finding that BRINK'S and BRINKMANN BACKYARD KITCHEN are confusingly similar.” *Id.* at p. 14, n.8.

Opposer Brink's Network's rationale demonstrates that Opposer has a fundamental misunderstanding of what dilution means. As Professor J. Thomas McCarthy notes:

The theory of dilution by blurring is *not* designed to apply where the goods and services of the parties are *competitive* or *related* in the sense that there is a likelihood of sponsorship, affiliation or connection. Dilution by blurring is a state of mind of the ordinary consumer separate and distinct from the perception which occurs when the consumer is likely to be confused as to source or affiliation. Dilution by blurring is not just another name for the injury to a trademark caused by confusion and mistake. Dilution is a name for a kind of erosion of the strength of a mark that could occur in the *absence* of consumer confusion.

(emphasis added). J. Thomas McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:69 (4th ed.).

The anti-dilution laws are meant to protect against “the use of DUPONT shoes,

BUICK aspirin, and KODAK pianos” by others. *See Moseley v. V Secret Catalogue Inc.*, 537 US 418, 431, 65 U.S.P.Q.2d 1801, 1807 (2003) (citing H.R.Rep. No 104-374, p.3 (1995), U.S.Code Cong. & Admin. News 1995, pp 1029, 1030). The anti-dilution laws are also meant to protect against “TYLENOL snowboards, NETSCAPE sex shops and HARRY POTTER dry cleaners” by others. *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d at 894, 903, 63 U.S.P.Q.2d 1715, 1720 (9<sup>th</sup> Cir. 2002) (internal quotations and citations omitted).

If Opposer truly believed that the mark BRINKMANN diluted the mark BRINK’S, then Opposer should have promptly objected to the use of BRINKMANN BACKYARD KITCHEN precisely because outdoor grills are not competitive with or related to home security products. The addition of “Backyard Kitchen” does not change this analysis. The recent Ninth Circuit case of *Nissan Motor Co. v. Nissan Computer Corp.*, 378 F.3d 1002, 72 U.S.P.Q.2d 1078 (9th Cir. 2004), squarely addresses this issue:

The point of dilution law is to protect the owner's investment in his mark. This is why it is actionable for a store to call itself KODAK Pianos, as well as KODAK. As the use of KODAK pianos would dilute KODAK, then NISSAN pianos would dilute NISSAN if the NISSAN mark were as famous as KODAK. It follows that NISSAN Computers is a use that arguably dilutes the NISSAN mark . . . In sum, just as the TYLENOL mark, the BARBIE mark, and the KODAK mark are used in commerce when “snowboards,” “Girl,” and “pianos” are added, the NISSAN mark is used in commerce when other words are added to it such that if NISSAN were a famous mark, then “NISSAN Computer” could be a dilutive commercial use.

*Id.* at 1011-1012, 72 U.S.P.Q.2d at 1083-1084 (citations omitted). Opposer Brink’s Network cannot then argue that “Backyard Kitchen” has a significant impact on the degree of similarity required for a dilution claim.

**b. Opposer Cannot “Toll” Cancellation of Applicant’s U.S. Registration No. 2,779,986 While It Becomes Incontestable**

Opposer Brink’s Network also urges the Board to rule that “the filing of an opposition against one mark on dilution grounds should toll laches with respect to petitioning cancellation of a registration of a confusingly similar mark on the same grounds.” *See* Opposition at p. 14. Opposer’s argument is ludicrous.

Section 14 of the Lanham Act provides that a petition to cancel a registration must be brought within five years from the date of registration. 15 U.S.C. § 1064. This is a statutory requirement. Section 14(3) of the Lanham Act lists the grounds that can be asserted as a basis for cancellation “at any time,” that is, either before or after a challenged registration is five years old. 15 U.S.C. § 1064(3). Such grounds include functionality, fraud, abandonment and genericness. *Id.* Dilution is not a listed ground.

The five year anniversary of Applicant Brinkmann’s Registration No. 2,779,986 was on November 4, 2008. Opposer Brink’s Network never filed an opposition or cancellation proceeding against the registration, and is now foreclosed from doing so. Furthermore, Applicant’s registration was declared incontestable by the PTO on December 2, 2008.

Opposer’s argument that the deadline to cancel Applicant’s Registration No. 2,779,986 is “tolled” by the present proceeding is completely without merit and directly contrary to a plain reading of the Lanham Act.

**c. Applicant’s Reliance on the *Morehouse* Defense is Not Misplaced**

Opposer Brink’s Network insists that it is not guilty of laches because Applicant’s two pre-existing registrations for BRINKMANN are not in connection with “home security systems and components therefor.” Opposer Brink’s Network has also limited its dilution claim in the present proceeding just to those recited goods, on the ground that those goods are the



goods confusingly similar to Opposer's goods. If the present issue before the Board were Opposer's likelihood of confusion claim, Opposer's actions would make sense. But it does not make sense for Opposer's dilution claim, because for dilution, "use" by a defendant refers to any use in commerce, not just confusingly similar use or the specific use objected to by a plaintiff.

*See Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car, Inc.*, 330 F.3d 1333, 1336, 66

U.S.P.Q.2d 1811, 1818 (Fed. Cir. 2003). As Professor McCarthy notes:

The legal theory of dilution by blurring says that if customers or prospective customers see the plaintiff's famous mark used by other persons in a non-confusing way to identify other sources for many different goods and services, then the ability of the famous mark to clearly identify and distinguish only one source might be "diluted" or weakened. Therefore, to apply an antidilution law in a situation where the goods or services of the parties are competitive makes no sense.

J. Thomas McCarthy, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 24:74 (4th ed.). In such a dilution context, then, a laches defense should be allowed based upon the opposer's failure to object to an applicant's prior registration of substantially the same mark, regardless of the registered goods or services. Any "harm" of alleged dilution caused by the prior registration is independent of the fact that it did not involve substantially the same or similar goods or services.

Since Opposer Brink's Network's ground for opposition based on alleged dilution does not depend on use of the BRINKMANN mark on similar or related goods, the affirmative defense of laches based on Applicant Brinkmann's pre-existing registrations is applicable to a dilution claim regardless of whether the goods in the pre-existing registrations are different from the goods in the opposed application.

C. **It is Undisputed that Applicant Brinkmann Has Suffered Material Prejudice Due to Opposer's Unreasonable Delay, and Reliance is Unnecessary for Laches**

Opposer Brink's Network's unreasonable delay has caused material prejudice to Applicant Brinkmann that directly implicates Applicant's most important brand, and, in fact, the very identity of the company. Opposer Brink's Network claims that Applicant cannot demonstrate prejudice because there was no detrimental reliance by Applicant on Opposer's unreasonable delay. Specifically, Opposer alleges that Applicant's use of its mark was based on Applicant's own opinion that no conflict with Opposer's mark existed, rather than any reliance on Opposer's inaction. Opposer misstates the law. Detrimental reliance is an element necessary for equitable estoppel, not laches. A party asserting laches does not have to show reliance on the delay of the other party. The Federal Circuit has made this explicitly clear:

When there has been an unreasonable period of delay by a plaintiff, economic prejudice to the defendant may ensue whether or not the plaintiff overtly lulled the defendant into believing that the plaintiff would not act, or whether or not the defendant believed that the plaintiff would have grounds for action.

(Emphasis added). *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Ouest de la France*, 245 F.3d 1359, 1363, 58 U.S.P.Q.2d 1460, 1463 (Fed. Cir. 2001). In fact, one of the very cases that Opposer cites in its opposition is absolutely clear on this point: "[R]eliance is not a requirement of laches but is essential to equitable estoppel." *A.C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1042, 22 U.S.P.Q.2d 1321, 1336 (Fed. Cir. 1992) (en banc) (citations omitted). Most of the cases on which Opposer relies involved not only laches but an equitable estoppel defense as well. The detrimental reliance that the courts required in those cases related to the estoppel defense, not the laches defense.

For a laches defense, Applicant Brinkmann need only demonstrate evidentiary prejudice due to loss of evidence or memory of witnesses or economic prejudice based on loss of

time or money or foregone opportunity. *Bridgestone/Firestone Research*, 245 F.3d 1359, 1362, 58 U.S.P.Q.2d 1460, 1463. As previously discussed in Applicant's Motion for Partial Summary Judgment, Applicant Brinkmann has amply demonstrated the material prejudice it has suffered. Brinkmann adopted and used BRINKMANN as its house mark for over 30 years on nearly every product it makes and sells. Applicant Brinkmann has invested an enormous amount of time, effort and money in promoting its mark BRINKMANN and steadily expanded its product lines under its mark. Opposer Brink's Network cannot be allowed, after nearly 30 years of inaction, to take away Applicant Brinkmann's company identity and force Applicant to start all over again.

#### IV. CONCLUSION

Dilution law is meant to prevent another from whittling away the value of a famous mark by taking a "free ride" on the owner's fame. Nothing in the record suggests that Brinkmann is attempting such a free-ride. The undisputed facts are that Brinkmann adopted the BRINKMANN mark because it is the surname of the company founder, and Brinkmann has proceeded to promote its mark for nearly 30 years without objection from Opposer.

For all of the foregoing reasons, Applicant Brinkmann respectfully requests that the Board grant its motion and dismiss Opposer's claim of dilution.

Dated: January 5, 2009

  
\_\_\_\_\_  
Gary A. Clark  
Susan Hwang  
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
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Attorneys for Applicant  
THE BRINKMANN CORPORATION

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

BRINK'S NETWORK, INCORPORATED,

Opposer,

v.

THE BRINKMANN CORPORATION,

Applicant.

Opposition No. 91164764

**DECLARATION OF SUSAN HWANG UNDER 37 C.F.R. § 2.20**

I, Susan Hwang, hereby declare as follows:

1. I am an associate at the law firm of Sheppard, Mullin, Richter & Hampton LLP, counsel of record for Applicant The Brinkmann Corporation.
2. I make this declaration in connection with an opposition proceeding, No. 91164764, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.
3. Attached as Exhibit 1 is a true and correct copy of the Combined Declaration of Use and Incontestability under Sections 8 & 15 of the Trademark Act (15 U.S.C. Sections 1058 & 1065) filed by Applicant for Registration No. 2,779,986 on November 7, 2008.
4. Attached as Exhibit 2 is a true and correct copy of the "Notice Of Acceptance and Acknowledgment Of §§ 8 & 15 Declaration" for Registration No. 2,779,986 issued on December 2, 2008.

The undersigned being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false

statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of her own knowledge are true; and all statements made on information and belief are believed to be true.

Date: January 5, 2009

By: \_\_\_\_\_



SUSAN HWANG

## **Exhibit 1**

# IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

## TRANSMITTAL LETTER, COMBINED DECLARATION OF USE AND INCONTESTABILITY UNDER SECTIONS 8 & 15

Name of Owner: **The Brinkmann Corporation**  
 Registration Number: **2,779,986**  
 Trademark: **BRINKMANN BACKYARD KITCHEN**

International Class(es): **11**

### TO THE COMMISSIONER FOR TRADEMARKS:

Transmitted herewith is a Combined Declaration of Use and Incontestability under Sections 8 & 15 and fee calculated as follows:

Total # Classes		Fee/class			
1	x	\$300.00	=	<b>BASIC FEE</b>	<b>\$300.00</b>
Check here if filing during grace period <input type="checkbox"/>				<b>GRACE PERIOD FEE</b>	<b>\$0.00</b>
				<b>TOTAL FEE</b>	<b>\$300.00</b>

- ☐ A check in the amount of \_\_\_\_\_ is attached.
- ☒ Please charge Deposit Account No. **19-1853** in the amount of **\$300.00**
- ☒ The Director is hereby authorized to charge any underpayment of fees associated with this Declaration or credit any overpayment to Deposit Account No. **19-1853**
- ☐ Payment by credit card. Form PTO-2038 is attached.

**WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.**

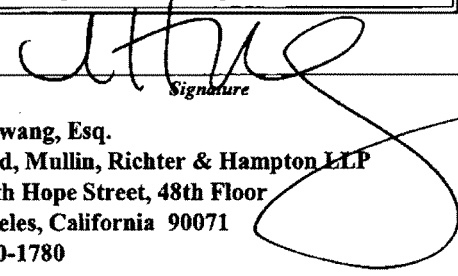
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I certify that this document and fee is being deposited on
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Signature of Person Mailing Correspondence
Typed or Printed Name of Person Mailing Correspondence
"Express Mail" Mailing Label Number

### Certificate of Mailing by First Class Mail

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451" [37 CFR 1.8(a)] on
November 7, 2008
(Date)
Signature of Person Mailing Correspondence
Betty I. Rodriguez
Typed or Printed Name of Person Mailing Correspondence

Dated: November 7, 2008

  
 Susan Hwang, Esq.  
 Sheppard, Mullin, Richter & Hampton LLP  
 333 South Hope Street, 48th Floor  
 Los Angeles, California 90071  
 (213) 620-1780  
 (213) 620-1398 Fax



11-10-2008

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

COMBINED DECLARATION OF USE & INCONTESTABILITY  
UNDER SECTIONS 8 & 15 (15 U.S.C. SECTIONS 1058 & 1065)  
(With Power of Attorney)

To the Commissioner for Trademarks

Docket No. **0SEM-077813**  
Trademark: **BRINKMANN BACKYARD KITCHEN**

Registration Number: **2,779,986**  
Registration Date: **November 4, 2003**  
Name of Owner: **The Brinkmann Corporation**  
Address of Owner: **4215 McEwen Road**  
**Dallas, Texas 75244**

The Owner hereby appoints the below named domestic representative upon whom notice or process in the proceedings affecting the mark may be served.

Name of Domestic Rep.:

Address of Domestic

Representative:

*(Required ONLY if the  
owner's address is outside  
the United States)*

The Owner has used the above-identified mark in commerce for five (5) consecutive years after the date of registration, or the date of publication under Section 12(c), and is still using the mark in commerce on or in connection with all goods listed in the above-identified registration, except for the following:

as evidenced by the attached specimen showing the mark as currently used in commerce. There has been no final decision adverse to the owner's claim of ownership of such mark for such goods, or to the owner's right to register the same or to keep the same on the register; and there is no proceeding involving said rights pending and not disposed of either in the Patent and Trademark Office or in the courts.



**DECLARATION**

The undersigned, being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of this document, declares that I am properly authorized to execute this document on behalf of the Owner; and all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Signature: \_\_\_\_\_

Name: **Martin P. Donoghue**Title: **Vice President**Date: **Nov 5**, 2008

Indicate below the nature of authority under which signatory signs:

- ☒ A person with legal authority to bind the Owner; or  
☐ A person with firsthand knowledge of the facts and actual or Implied authority to act on behalf of the Owner; or  
☐ An attorney as defined in 37 C.F.R. 10.1(c) who has an actual or implied written or verbal power of attorney from the Owner.

**Contact Information:**

Address all correspondence in this matter to the following:

Name: Susan Hwang, Esq.  
Company/Firm Name: Sheppard, Mullin, Richter & Hampton LLP  
Address Line 1: 333 South Hope Street, 48th Fl.  
Address Line 2: \_\_\_\_\_  
City: Los Angeles  
State: California  
Country: USA  
ZIP Code/Postal Code: 90071  
Telephone Number: (213) 620-1780  
Fax Number: (213) 620-1398  
Email Address: \_\_\_\_\_

- ☐ Applicant will accept correspondence by email.  
☒ Applicant will **not** accept correspondence by email.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

COMBINED DECLARATION OF USE & INCONTESTABILITY  
UNDER SECTIONS 8 & 15 (15 U.S.C. SECTIONS 1058 & 1065)  
(With Power of Attorney)

Docket No. **0SEM-077813**  
Trademark: **BRINKMANN BACKYARD KITCHEN**

Registration Number: **2,779,986**  
Registration Date: **November 4, 2003**  
Name of Owner: **The Brinkmann Corporation**  
Address of Owner: **4215 McEwen Road**  
**Dallas, Texas 75244**

**POWER OF ATTORNEY**

Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

Dear Sir:

I hereby appoint:

**James R. Brueggemann**  
**Gary A. Clark**  
**Susan Hwang**  
**Darren Franklin**  
**Bridgette A. Agness**  
**Dennis Smith**  
**Daniel Muniz**

as principal attorney(s) to submit this document and to transact all business in the Patent and Trademark Office connected therewith.

By:



**Martin P. Donoghue**  
**Vice President**

Dated: Nov 5, 2008

**BRINKMANN®**

# ***Backyard Kitchen®***

**Heavy-Duty Outdoor Grill**

Registration No.: 2,779,986  
Docket No.: 0SEM-077813

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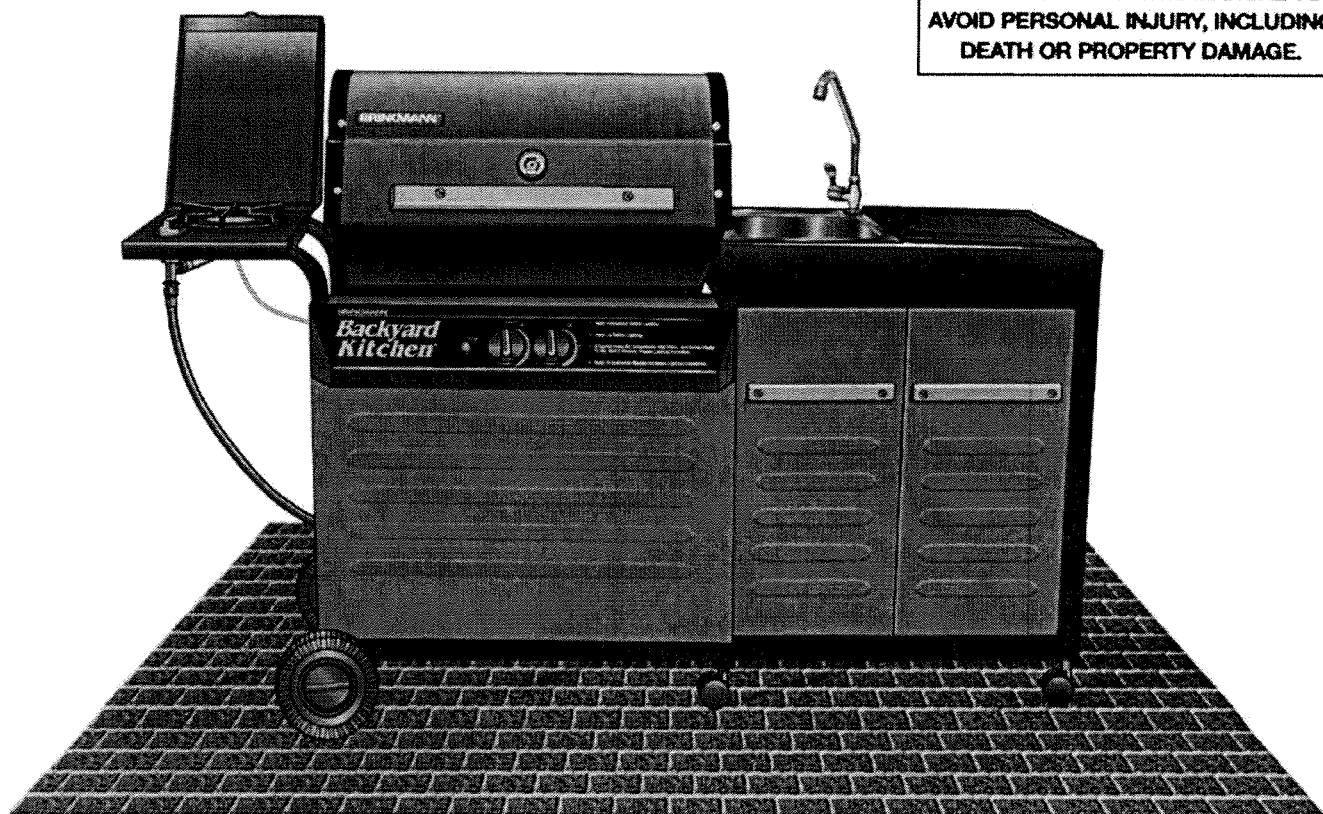
## **OWNER'S MANUAL**

**ASSEMBLY AND OPERATING INSTRUCTIONS**

**SAVE THIS MANUAL FOR FUTURE REFERENCE**

### **⚠ WARNING**

HAZARDOUS EXPLOSION MAY  
RESULT IF THESE WARNINGS AND  
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INSTRUCTIONS IN THIS MANUAL TO  
AVOID PERSONAL INJURY, INCLUDING  
DEATH OR PROPERTY DAMAGE.



## **Exhibit 2**



**NOTICE OF ACCEPTANCE AND  
ACKNOWLEDGEMENT OF §§8 & 15  
DECLARATION**  
MAILING DATE: Dec 2, 2008

The combined declaration of use and incontestability filed in connection with the registration identified below meets the requirements of Sections 8 and 15 of the Trademark Act, 15 U.S.C. §1058 and 1065. The combined declaration is accepted and acknowledged. The registration remains in force.

For further information about this notice, visit our website at: <http://www.uspto.gov>.  
To review information regarding the referenced registration, go to  
<http://tarr.uspto.gov/>.

REG NUMBER: 2779986  
MARK: BRINKMANN BACKYARD KITCHEN  
OWNER: Brinkmann Corporation, The

40532876-3002-346

UNITED STATES PATENT AND TRADEMARK OFFICE  
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing APPLICANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT TO DISMISS OPPOSER'S CLAIM FOR DILUTION upon Nancy S. Lapidus, counsel for Opposer, at Howrey LLP, 1299 Pennsylvania Ave., N.W., Washington, D.C. 20004, via first class mail, postage prepaid, on January 5, 2009.

  
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BETTY I. RODRIGUEZ